Supreme Court of the United States

OCTOBER TERM, 1951

No. 323

THE CRUMMER COMPANY and R. E. CRUMMER & COMPANY, *Petitioners,* *vs.* The Honorable WILLIAM J. BARKER, Judge of The United States District Court For The Southern District of Florida, *Respondent.*	No. 323

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The findings of fact and opinion of the District Court (R. p. 628-643) are unreported.

The opinion of the Court of Appeals for the Fifth Circuit (R. k, 1) is unreported.

Jurisdiction

Petitioners seek to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

Questions Presented

As we view it, the questions presented[1] are as follows:

1. Did the District Court abuse its discretionary power granted by Section 1404(a), Title 28, U. S. Code in determining that "the convenience of parties and witnesses, in the interest of justice" impelled a transfer of the action?

2. Did the District Court correctly decide that the action "might have been brought" in the Tallahassee Division within the meaning of Section 1404(a)?

3. Did the Court of Appeals properly refuse to exercise the drastic remedy of mandamus in the present case?

Statement of Facts

A. Scope of the Action

While denominating their action one to recover treble damages for an alleged conspiracy to monopolize interstate trade in defaulted Florida municipal securities and the refunding thereof, the plaintiffs, which are both Delaware corporations, basically ground their action upon four allegedly malicious and improper abuses of legal process, around which primarily all the overt acts averred in the elaborate and embroidered Complaint revolve, to wit:

(1) A criminal prosecution of, among others, the plaintiffs, authorized by the Attorney General of the United States and filed in 1944 by the United States Attorney in

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[1] Petitioners assert that the questions presented are as follows (Pet. p. 2):
1. Is an erroneous transfer order under Section 1404(a) of Title 28, U. S. Code reviewable by extraordinary writ?
2. Are the standards established by this Court in Gulf Oil Corp. v. Gilbert 330 U. S. 501 (1947) applicable to a motion for transfer under Section 1404(a) of Title 28, U. S. Code?
3. When suit is brought in a proper venue and a counterclaim is filed there, may the Court transfer the entire action including the counterclaim, to another forum, under Section 1404(a), although for all that appears in the record venue in the transferee forum would be improper?
4. Is Section 1392 of Title 28, U. S. Code applicable to anti-trust suits?

the State of Kansas, together with the preliminary investigation, conducted under appropriate authorization by the Post Office Department and the Securities and Exchange Commission, through their identified employees, giving rise to such criminal prosecution (R. pp. 31-41, inclusive);

(2) Investigations conducted in January, 1943 and 1944, at Tallahassee, Florida, by the Securities Commission of the State of Florida, a statutory body authorized under Chapter 517, Florida Statutes Annotated, to determine whether to grant the plaintiff, The Crummer Company, a license to do business as a security dealer within the State of Florida, during one of which investigations certain of the defendants allegedly testified, and after which plaintiffs assert in their Complaint the Commission improperly denied the plaintiff such license (R. pp. 41-4, inclusive);

(3) A legislative investigation authorized at Tallahassee, Florida, in May, 1941, but not activated until 1942 by Executive Proclamation with funds made available by the Governor of Florida, into the refunding of defaulted Florida taxing unit securities, including those of the plaintiff, R. E. Crummer & Company, carried out under the authority of a House Resolution duly approved by the House of Representatives of the State of Florida and under an Executive Proclamation of the Governor of Florida; implemented by a grant made by the Governor of Florida out of the emergency funds subject to the Governor's orders (R. pp. 50-52).

(4) Resort in 1942 and 1944 by certain of the defendants to suits in the federal and state courts for declaratory judgments to determine the validity of certain of the refunding contracts of the plaintiff, R. E. Crummer & Company (R. pp. 44-9, inclusive).

The Complaint, also, charges as overt acts against the defendants the refusal in the latter part of 1941 by the State Board of Administration of the State of Florida as

to Sarasota County, and the governing county board of Lee County, Florida, to carry out certain alleged contractual rights of the plaintiff R. E. Crummer & Company (R. pp. 49-50).

The defendants denied generally the broad allegations of wrongdoing leveled by the plaintiffs at the individual defendants, Federal officials charged with the enforcement of criminal law and State legislative and administrative officers engaged in the discharge of duties under appropriate legislative resolution or by virtue of pertinent statutory authority, and certain of the defendants countered with the charge that the plaintiffs through improper means had actually achieved an illegal monopoly in the securities of financially embarrassed Florida taxing units deriving therefrom unconscionable improper gains. Cf. *United Mutual Life Ins. Co. v. Avon Park,* 1940, 311 U. S. 138, rehearing denied 311 U. S. 730.

The Complaint alleges that some twenty-two overt acts done in connection with the conspiracy and representing the basis of plaintiffs' cause of action were committed by the defendants in widely scattered places including the State of Florida. Of the twenty-two overt acts, eleven were allegedly committed in the Northern District of Florida, ten of which occurred in the Tallahassee Division to which this action has been transferred for trial (R. pp. 32-43).

Of the four overt acts alleged to have been committed in the Southern District of Florida, not one occurred in the Orlando Division, where this action was originally commenced by the plaintiffs (R. pp. 45-50). Three were alleged to have been committed in Topeka, Kansas in conjunction with hearings before the Grand Jury which returned indictments against the plaintiffs (R. pp. 35-36); and four were alleged to have been committed in the District of Columbia in connection with the United States

Post Office Department and the activities of its employees (R. pp. 31, 33, 34).

Domicile of the Parties.

The petitioner, R. E. Crummer & Company, a Delaware corporation, engaged primarily in the refunding of the securities of Florida taxing units from 1934 through the year 1942 (R. 629-30) and maintained offices in Florida, Kansas, and Illinois (R. 437-449). In 1942, it ceased to do business and according to records filed with the Secretary of the State of Delaware (R. 436) it distributed its assets among its then stockholders[2] (R. 436) all of whom were members of the Crummer family. These persons are all domiciled outside the State of Florida. Since January 1, 1943 R. E. Crummer & Company has maintained no office and has had no employees within the State of Florida (R. 420). Its president, R. E. Crummer, has his legal residence in Reno, Nevada; its secretary and treasurer, Joy Bowerman, maintains the Company's only office in Chicago, Illinois. Its records are spread about, some in the possession of its auditor or attorneys in Wichita, Kansas, some at the only corporate offices now maintained in Chicago, Illinois, and some left with its co-defendant, The Crummer Company (R. pp. 419-423, inclusive).

In 1943, The Crummer Company, another Delaware Corporation, was formed, the main purposes and objects of which were to engage in the buying, selling and otherwise dealing in municipal securities of taxing units as distinguished from the main purposes and objects of the plaintiff, R. E. Crummer & Company, which had been to restore the credit of financially distressed Florida taxing units through refundings of outstanding securities (R. 21). Some of the former records and personnel of R. E. Crummer & Company were taken over by the new company,

[2] All corporate stock was then surrendered to the corporation in connection with the distribution of its assets. (R. 435)

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The Crummer Company (R. 629). The Crummer Company maintains its Florida office at Orlando (R. 354) and the existence or whereabouts of other offices is not disclosed.

The defendants, Edward Ball and St. Joe Paper Company, are residents of the Northern District of Florida (R. 631) (the transferee forum), Edward Ball residing in the Tallahassee Division (R. 631), and the St. Joe Paper Company having its principal offices in the Marianna Division (R. 631).[3]

The defendants, Jessie Ball duPont, Roger L. Main, Florida National Bank of Jacksonville, Clyde C. Pierce, Pierce Corporation and Cummer Sons Cypress Company, are residents of the Jacksonville Division of the Southern District of Florida (R. 631).

The defendants, E. J. Mansfield, Walter P. Fuller, S. Wallace Shafer, and Walter P. Gall are residents of the Tampa Division of the Southern District of Florida (R. 632).

The defendants, Howard S. Wheeler, Paul L. Pierce, Loomis C. Leedy and Leedy-Wheeler-Alleman, Inc., are residents of the Southern District of Florida, Orlando Division (R. 631).

B. Events in the District Court

The Attorney General of the State of Florida petitioned the District Court for leave to appear as attorney on behalf of the defendants, Clement, Shafer, and Fuller (R. 318).[4] While such petition was pending and by permission of the Court, the Attorney General filed a Motion to Transfer the cause to the Tallahassee Division under Section 1404-

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[3] Ball and St. Joe Paper Co. are two of the principal defendants (R. 23-27) whose overt acts are heavily relied upon (R. 27-29, 42).

[4] Florida Constitution, Article IV, Section 22; F.S.A. 16.01; State v. Gleason 12 Fla. 190.

(a), 28 U. S. C. Such Motion was joined in and adopted by the defendants, Clement, Shafer and Fuller as their own Motion (R. 337-339). All other defendants except two (R. 629) thereafter made similar motions to transfer, in most instances joining in the Attorney General's Motion and adopting it as their own (R. 340-345).

One of the defendants filing no motion to transfer was Mansfield, a retired post office inspector who is now represented by United States Government counsel; i.e. a United States attorney (R. 629). The other such defendant was Cummer Sons Cypress Company, one of the lesser defendants (R. 46), whose residence is in the Jacksonville Division.

After the filing of the Motions to Transfer, Judge Barker gave due written notice to counsel for all parties that a hearing would be held upon all motions to transfer and joinders therein (R. 465). At the hearing held on November 5, 1950 the only parties objecting to the transfer were the petitioners (R. 465). All defendants, except Mansfield and Cummer Sons Cypress Co., appeared responsive to the Judge's notice of hearing and vigorously urged the transfer (R. 467-546).

Following the hearing, Judge Barker made numerous findings of fact (R. 628) and ordered the case transferred to the Tallahassee Division pursuant to Section 1404(a) (R. 642).

The District Court in the findings of fact found, among other things, that due to the scope of the action set forth in the pleadings, as indicated above, that: (a) the best centralized source of documentary proof needed at the trial was in Tallahassee in the offices of various State agencies (R. 635-638); (b) because of the long period of time covered by the pleadings and the technical nature of the subject matter of the suit that documentary proof would be an important source of evidence for both parties (R. 639); (c) ten of the twenty-two alleged overt acts

occurred in the Tallahassee Division, the transferee forum (R. 633) and none occurred in Orlando, the transferor forum (R. 633); (d) many, if not most, of the witnesses, for both parties, would come from around Tallahassee, the locale of a two thirds of the Florida overt acts (R. 641); (e) in view of the expected long trial and the condition of the respective dockets, a speedier trial was much more likely in the Tallahassee Division (R. 641); and (f) the action could have been originally brought in the Tallahassee Division, within the meaning of Section 1404(a) and Section 1392(a) of 28 U. S. Code (R. 632).

Judge Barker, after an examination of all factors (R. 642) in terms of "convenience of parties and witnesses, in the interest of justice" found that "the Record shows that a sufficient weight of factors favoring the transfer has been established to impel the granting of the motion to transfer." He found and concluded the convenience of parties and prospective witnesses would be better served by the transfer (R. 642) and that in the interest of justice the transfer should be made (R. 642).

It was apparent that the District Judge considered the domicile of all parties (R. 629, 631); the location of their records (R. 639), and the sources of other documentary evidence (R. 635-639); the witnesses likely to be called by both parties at the trial (R. 640) and the location of the alleged overt acts (R. 633) in making his decision as to the "convenience of parties and witnesses."

C. The Proceedings in the Court of Appeals

On April 24, 1951, the petitioners filed a motion in Court of Appeals for the Fifth Circuit for leave to file a petition for mandamus or other relief to be directed to Judge Barker, to vacate and set aside the transfer order, attaching as exhibits to said motion and petition, copies of all appropriate proceedings below (R. j.). After oral argument

(Pet. p. 6) and upon consideration of the motion for leave to file and the said petition, the Court of Appeals denied the motion without opinion on April 24, 1951 (R. k.). . .

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix "A", infra pp. 26.

ARGUMENT

Petitioners' Questions Presented (see f. note p. 2) appear to be broader than their Specification of Errors to be urged, which are hereinafter set forth. Petitioners claim that the Court of Appeals erred. (Pet. p. 7).

1. In sanctioning the transfer order of the District Judge, although it was based upon wholly inadequate grounds and constituted an abuse of discretion amounting to a usurpation of power.

2. In denying plaintiffs' leave to file their petition for mandamus and failing to consider same on the merits.

3. In denying plaintiffs any relief whatever.

Summary of Argument

Point I will analyze the decisions below and show that the order of transfer was right and is not in conflict with the decision of this Court in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947).

Point II will show that the decision of the Court of Appeals below is not in conflict with decisions of other Courts of Appeal in connection with the controlling legal principles and standards applicable to transfers under Section 1404(a).

Point III will show that the Court of Appeals below had the merits presented and correctly refused to sanction mandamus proceedings against the District Judge, which decision is not in conflict with previous decisions of the same circuit, particularly the case of *Atlantic Coast Line R. v. Davis* (C.A. 5, 1949) 185 F. (2d) 766.

Point I.

A. The Decisions of the District Court and Court of Appeals were Right. They are not in Conflict with Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947).

Essentially, the petitioners' argument that the decisions below are in conflict with a decision of this Court are based upon the Gulf Oil case and can be reduced to two contentions; (1) that decision of this Court in *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501 (1947), a forum non conveniens case, decided prior to the enactment of Section 1404(a), settled the criteria and standards for transfers under 1404-(a), (Pet. Brief p. 8) and (2) that the District Judge erroneously decided that this action "might have been brought" in the Tallahassee Division within the meaning of Section 1404(a) and under Section 1392, 28 U. S. Code. (Pet. Brief p. 10-12).

(1) The District Judge did not Violate Standards of Gulf Oil Case

Even if petitioners were sound in their argument that the standards established in the Gilbert case must be exclusively applied in the determination of motions under Section 1404(a), the decision of the District Court would not be erroneous. The record before the District Court met the requirements as stated in the Gulf Oil case.[5]

[5] "Relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, cost of obtaining attendance of willing witnesses; possibility of view of premises, if view would be appropriate to action; and all other practical problems that make trial of case easy, expeditious and inexpensive." (p. 508, 330 U. S.)

The argument of the petitioners runs to the weight (Pet. Brief p. 8) which the district judge accorded certain factors and to the conclusions which he reached in attempting to resolve the conflicting facts presented by the motions and affidavits in the record. It is apparent that he accorded consideration to *all* relevant factors including those set forth in the Gulf Oil case.

Contrary to petitioners' argument, (Pet. Brief p. 8) the District Judge, considered the "private interests" of all parties, including The Crummer Company, for his findings show clearly a consideration of their respective domiciles (R. 629-631); the location of their records (R. 639) and their witnesses (R. 640). Petitioners do not claim a lack of consideration of the factor of "relative ease of access to sources of proof" but disagree with the conclusions of fact reached by the trier of fact, the district judge (Petitioners' Brief, p. 8). No disregard of this Gilbert case factor is apparent.

In contrast to petitioners' argument (Pet. Brief p. 8), the findings show that the district judge carefully considered the standards of the Gilbert case concerning trial witnesses.[6] In regard to witnesses, the district judge noted that the situation was highly speculative for neither side had identified by name or tentative list, witnesses expected to be called at the trial, either willing or unwilling (R. 640). He found that it was likely that many of the witnesses would come from in and about the Tallahassee Division, the locale of two-thirds of the alleged Florida overt acts (R. 640-641)[7] and the Florida Attorney Gen-

[6] (a) Availability of compulsory process for attendance of unwilling witnesses, (b) cost of obtaining attendance of willing witnesses.

[7] The essence of a civil cause of action under the anti-trust laws is injury directly caused by an overt act committed in violation of the anti-trust laws. Right of recovery in civil action for damages resulting from conspiracy in restraint of trade is not based upon the conspiracy itself but upon injuries resulting from the overt acts themselves done pursuant thereto. *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9, 1936) 85 F. (2d) 742, cert. den. 299 U. S. 613, 57 S. Ct. 315, 81 L. Ed. 452; *Sucklow Borax Mines Consol. v. Borax Consol. Ltd.* 81 F. Supp. 301, Aff. 185 F. (2d) 196, cert. den. 340 U. S. 943, 95 L. Ed. 418, 71 S. Ct. 506. Mere charges of conspiracy cannot support a civil action for treble damages. *Tilden v. Quaker Oats Co.* (C.C.A. 7, 1924) 1 F. (2d) 160.

eral's affidavit so stated (R. 404).

There can be no doubt that the defendants themselves will be present at the trial in order to testify in their own defense and to present their case. Their absence at that time would be too prejudicial to even be seriously contemplated or considered.

Petitioners did not make any claim below that any taxing unit officials from the Southern District would be unwilling witnesses and that a subpoena would be necessary to obtain their presence at the trial (R. 640).

After careful consideration the district court found that the Court in the Tallahassee Division had ample power by its order to require the presence of all parties, their officers and agents at the place of trial, if held at Tallahassee (R. 637). *Moffett v. Arabian American Oil Co., Inc.* (S.D.N.Y., 1948) 8 F. R. D. 566; Rules 5, 26, 30 and 37, Federal Rules of Civil Procedure.

In the light of the foregoing discussion the order does not force the plaintiffs to try their case on deposition and eliminate the attendance of witnesses. The Gulf Oil standard as to witnesses was met.

Petitioners contend (Pet. Brief p. 9) that district judge failed to adhere to the Gulf Oil standard that "unless the balance is strongly in favor of the defendant, the plaintiffs' choice of forum should rarely be disturbed". The district judge, though not using the precise words of the Gilbert case, found (R. 642):

> "upon examination of all factors in terms of parties and witnesses, in the interest of justice, the record shows that a sufficient weight of factors favoring the transfer has been established to impel the granting of the Motion to Transfer."

The foregoing is essentially a finding of "a strong balance of factors" in favor of the transfer.

(2) District Judge's Power to Transfer under Section 1404(a) is not Limited to Pre-Existing Standards announced under the old Forum Non Conveniens Doctrine.

The enactment by Congress of Section 1404(a) granted the trial courts a greater discretion to transfer cases than they formerly could exercise under the doctrine of forum non conveniens.

Prior to the enactment of Section 1404(a), when a plaintiff selected a highly inconvenient forum as determined by the tests enunciated in the *Gulf Oil case,* he was faced with a possibility that his action would be dismissed under the doctrine of forum non conveniens. The remedy granted by that doctrine was drastic. Such a plaintiff was to be relegated to the uncertainties of again obtaining jurisdiction over the defendants with the possibility that the applicable statute of limitations might have run by the time he did so. Moreover, he was required to undergo the expenses and trouble of beginning his action anew in another forum which, in all probability, was less convenient to him.

By enacting Section 1404(a) of the New Judicial Code, Congress remedied many of the shortcomings arising from application of the doctrine. By authorizing a transfer in lieu of dismissal, plaintiffs were no longer faced with the hardships referred to above. *Amalgamated Association, etc. v. Southern Bus Lines, Inc.* (C.C.A. 5, 1949) 172 F. (2d) 946, 948. Moreover, the remedy allowing transfer from an inconvenient forum was enlarged to be available to defendants in numerous classes of cases to which the doctrine was theretofore not applicable.[8]

Chief Judge Parker, (one of the advisors to the Committee upon this legislation) speaking for his court in *Jiffy Lubricator v. Stewart-Warner Corp.* (C.C.A. 4, 1940) 177 F. (2d) 360, 362 said:

> "The notion that 28 U.S.C.A. Section 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not." See Ex parte Collett 337 U. S. 55, 69 S. Ct. 944."

By these reforms, Congress intended to more nearly equalize the rights of plaintiffs and defendants in the place of trial and when the plaintiff selects a forum which does not meet, in the terms of the statute, "the convenience of parties and witnesses, in the interest of justice", the forum Court will transfer the action to a more appropriate forum.[9]

Though the criteria and standards announced in the Gulf Oil case may be useful guides in determining whether transfer should be affected under Section 1404(a), they are not exclusive guides. All relevant factors in terms of the "convenience of parties and witnesses in the interest of justice" should be considered in determining whether a proposed transfer should be made and were considered by the District Judge below.

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[8] Prior to the enactment of Section 1404(a), dismissal under the doctrine was granted only in actions to which the general venue statutes were applicable and denied in cases such as treble damage suits and action brought under the Federal Employer Liability Act to which special venue statutes were applicable. See U. S. v. National City Lines, Inc. 334 U. S. 573 (1948) (the first case) Baltimore & Ohio R. Co. v. Kepner 314 U. S. 44 (1941).

[9] Professor Moore, in his Commentary on the U. S. Judicial Code, distinguishes the old and the new as follows at page 209:

> "But it should be recalled that Justice Jackson was dealing (in Gulf Oil case) with forum non conveniens at a time when, if applied, it now results in a transfer. As a consequence, Courts may now properly utilize the doctrine more freely than it was proper to do when dismissal resulted."

As an afterthought, petitioners urge (Pet. Brief p. 12, 13) that this Court should decide the precise applicability of the Gulf Oil case standards to Section 1404(a) transfer motions and set out a guide for the trial courts or else anti-trust plaintiffs will be faced with so many uncertainties that they will be hesitant to bring actions to enforce their rights. (Pet. Brief p. 13).

The present rising tide of anti-trust suits in the Federal Courts brought by individual and corporate plaintiffs contradicts this contention. Congress has set forth the standard in Section 1404(a). The Federal Courts are, as stated by Judge Learned Hand[10] "often faced with indeterminate and indeterminable standards; reasonable notice, reasonable cause, gross negligence, the requisite proof in fraud or criminal prosecution." The application of the provisions of Section 1404(a) by Courts is neither new nor unique in granting to the District Court broad discretion in determining involved factual questions.

Precise and exclusive standards would indeed destroy much of the discretion given to the trial judges by Section 1404(a) and thereby unreasonably restrict them in dealing with the varied cases presented by various motions to transfer.

The facts in this case were fully considered by Judge Barker and his order, we submit, is not in conflict with any decision of this Court. He did not, as charged by petitioners, (Pet. Brief p. 7), abuse his discretionary power under Section 1404(a).

B. District Judge Correctly decided that the Action might have been Brought in the Tallahassee Division within the Meaning of Section 1404(a)

Petitioners contend that the Gilbert case requires two forums wherein the action might have been brought as a necessary pre-requisite for transfer under 1404(a).

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[10] Ford Motor Co. v. Ryan (C.A. 2, 1950) 182 F. (2d) 329, 332.

At the outset it should be noted that there is no question of the transferee Courts' jurisdiction involved in considering whether this suit could have been brought in the Tallahassee Division. Since all of the defendants, corporate and individual, are residents of Florida,[11] the Court could have validly acquired jurisdiction over them. Process issued by any Florida District Court under Rule 4(f) Federal Rules of Civil Procedure is effective anywhere within the borders of the State of Florida. The suit therefore could have been brought in the Tallahassee Division and maintained there unless there had been seasonable objection to the venue by defendants, as to whom that venue was improper. *Paramount Pictures v. Rodney* (C.A. 2, 1950) 186 F. (2d) 111.[12]

(1) Section 1392(a) of Title 28 U. S. Code would enable this Action to have been Brought in the Tallahassee Division

Appellants contend (Pet. Brief p. 8) that Judge Barker was in error when he found that the present action "could have originally been brought" in the Tallahassee Division within the meaning of Section 1404(a) and under the venue provisions of Section 1392 of 28 U. S. Code (R. 632). This contention is predicated upon the argument that venue in anti-trust suits is strictly limited by Sections 15 and 22 of the Anti-Trust Acts and is not embraced within the provisions of Section 1392(a). This position of the appellants, (Pet. Brief p. 8) that Section 1392(a) has no application

[11] Except Elbert Dent, a trustee of the duPont Estate, who joined in motion to transfer.

[12] As Chief Judge Biggs stated therein at p. 114-115:

> "The suits in the District of Delaware are based, as we have said, on the anti-trust laws. Jurisdiction to adjudicate such controversies was conferred on all United States District Courts by Sections 41(8) and (23) of Title 28, U.S.C. 1940 ed. now covered into Section 1337 of revised Title 28, United States Code Annotated. Suits embracing the identical subject matter could have been brought and literally 'might have been brought' by the plaintiffs against the defendants in any district court in Texas. Moreover, if brought, the suits could have been maintained unless there had been seasonable objection to venue by the defendants, ... If jurisdiction to adjudge the controversy between the parties be in the court in which suit is brought, no matter whether venue be properly laid in that district or not, the court will be deemed to have jurisdiction of the persons of the defendants and they will be treated as having submitted themselves to jurisdiction if there be no seasonable objection."

to anti-trust suits, which, according to them, are governed exclusively by the anti-trust venue and service provisions, is contrary to all the decisions which have considered the matter.

Section 1392(a) provides:

> "(a) *Any civil action,* not of a local nature, against defendants residing in different district in the same state, may be brought in any of such districts." (Emphasis added)

We have found only three decisions in which this matter has been considered. In each decision Section 1392 has been held to be applicable to anti-trust actions. *Auburn Capitol Theater Corp. v. Schine Chain Theatres* (S.D.N.Y., 1949) 83 Fed. Supp. 872, *Anderson-Friburg, Inc. v. Clary & Sons, Inc.* et al. (S.D.N.Y., 1951) 98 Fed. Supp. 75, *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.* et al. (S.D.N.Y., 1949) 88 Fed. Supp. 863. Typical of the reasoning in these cases is the opinion of Judge Weinfield in *Anderson-Friburg, Inc. v. Clary & Sons, Inc.* et al. ante at p. 83 of 98 Fed. Supp.:

> "The venue provisions contained in the anti-trust laws are intended as an enlargement of venue and to broaden the choice of the forum available to plaintiffs in anti-trust actions. U. S. vs. Scophony Corporation of America, 333 U.S. 795, 804, 68 S. Ct. 855, 92 L. Ed. 1091; Abrams v. Bendix Home Appliances, Inc. (D.C.) 96 Fed. Supp. 3.
>
> "The general venue provisions now contained in New Title 28, Section 1391, et seq., effective September 1, 1948, may be considered supplementary to, and not in limitation of, the venue provisions contained in the anti-trust laws and other special statutes. Thus, for example, the forum non-conveniens provision, Section 1404(a) of Title 28, has been held applicable to anti-trust suits and the Federal Employers' Liability Act, 45 U.S.C.A. s. 51 et seq., U. S. v. National City Lines, Inc., 337 U. S. 78, 69 S. Ct. 944, 959, 93 L. Ed. 1297."

It would be inconsistent and illogical for this Court to adhere to its decision in *U. S. v. National City Lines* 337

U. S. 78 which decided that the phrase *"any civil action"* in Section 1404(a) included anti-trust and other special venue actions, and then to rule to the contrary that the same phrase *"any Civil action"* in Section 1392 did not apply to anti-trust actions, because the special anti-trust venue statutes were intended by Congress to be exclusive of all other venue statutes for anti-trust plaintiffs.

A ruling that Section 1392 was not applicable to anti-trust cases would not be in keeping with the legislative history and intent with which the special venue provision of anti-trust laws were enacted, i.e. to broaden the venue privileges of anti-trust plaintiffs.[13]

Such conclusion would unreasonably limit the trial court's discretionary power to transfer cases under Section 1404(a) in multiple defendant cases, and would force an anti-trust plaintiff to institute two or more separate actions against anti-trust defendants living in different judicial districts within the same state. Such procedure would result in circuity of action, since the defendants could move to consolidate the cases by a motion to transfer under 1404(a). *Apex Electrical Mfg. Co. v. Sears Roebuck & Co.* 87 F. Supp. 533 (1949).

(2) Decisions Upon Patent Case Venue are not Applicable to Anti-Trust Cases

The cases of *Sonite Products Co. v. Melvin-Lloyd Company et al.* 315 U. S. 560, 80 L. Ed. 1026 (1942) and *Ackerman v. Hook* (C.A. 2, 1950) 183 F. (2d) 11 cited by petitioners held that the special patent infringement venue statute as enacted in 1897 (Section 109, of old Title 28, U. S. Code)[14] was intended as a special and exclusive venue provision for such suits narrowing the prior broader venue authorized in such actions. The opinions held that since Section 109 was intended as exclusive venue, patent infringe-

[13] U. S. v. National City Lines, Inc. 337 U.S. 78. U. S. v. Scophony 333 U. S. 795.

[14] Now Section 1400(b), 28 U. S. Code.

ment suits were not embraced within the general venue provisions of Title 28 of the Judicial Code.

Contrary to the legislative history and objective of old Section 109 covering patent infringement suits, the legislative purpose in enacting the special anti-trust venue provisions was to broaden and extend, not to narrow, the existing venue applicable to such anti-trust suits. *U. S. v. National City Lines,* 334 U. S. 573, 68 S. Ct. 1169, 92 L. Ed. 1584 (1949); *U. S. v. Scophony Corp. of America,* 333 U. S. 795, 809, 92 L. Ed. 1091 (1948). Accordingly, any reference to decisions having to do with venue in patent infringement suits is wholly without application to suits under the anti-trust laws.

The recent decisions of this Court[15] holding that Section 1404(a) is applicable to *"any civil action"* despite special venue statutes, are indicative that the general venue provisions of Section 1392 are applicable to plaintiffs in anti-trust actions when the District Court is deciding whether a suit "might have been brought" within the meaning of Section 1404(a).

(3) All Defendants have Waived any Venue Objection to Suit in the Tallahassee Division

It should be observed, too, that, even if Section 1392 were not applicable, the only parties in a position to object to venue in the Northern District have, either by joining in the motion to transfer or by failing to object thereto, waived any objection to venue in that Court.

The plaintiffs in the present case (R. 465) were the only parties in the suit who opposed the transfer to the Tallahassee Division. All defendants, except two, either made or joined in the motions to transfer (R. 629). The two non-moving defendants (and all other parties) were notified 30 days in advance by the Trial Judge of the hearing to be

[15] U. S. v. National City Lines, 334 U. S. 573; Ex parte Collett, 337 U. S. 55.

held thereon (R. 465) and made no objection to the transfer either at the hearing or during the five months that the Trial Judge had the matter under advisement.

Section 1406(b) of New Title 28, U. S. Code provides:

> "1406(b) Cure or Waiver of Defects.
>
> "Nothing in this Chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. June 25, 1948, C. 646 S. 1, 62 Stat. 937; May 24, 1949 C. 139 S. 81, 63 State. 101."

This Court denied certiorari in the case of *Paramount Pictures v. Rodney* (C.A. 3, 1950) 186 F. (2d) 111, at 340 U. S. 953, on March 26, 1951, wherein the Court of Appeals for the Third Circuit reversed a Trial Judge who had held that defendants could not waive or consent to venue in the transferee forum in determining whether the suit "might have been brought" under the provisions of 1404(a).

Judge Ryan made a similar ruling that defendants could waive venue in *Ferguson v. Ford Motor Company,* (S.D.N.Y., 1950), 89 F. Supp. 45, 49, which ruling was not considered by the Second Circuit at 182 F. (2d) 329, 332, but in which case certiorari was denied by this Court at 340 U. S. 851 (1950).

Therefore, regardless of the applicability of the general venue provision of Section 1392, transfer is proper under Section 1404(a).

Point II.

Decision of Court of Appeals below is not in Conflict with Decisions of the other Courts of Appeal

Contrary to Petitioners' contention, (Pet. Brief p. 13) the Fifth Circuit in denying the application for mandamus proceedings, did not render a decision in conflict with the decision of the Second Circuit in *Ford Motor Co. v. Ryan*

(C.A. 2, 1950) 182 F. (2d) 329. This contention is based primarily upon the argument that the decision of the District Judge below accorded no consideration to the standards set forth in *Gulf Oil Corp. v. Gilbert,* 330 U. S. 351. Respondent has already pointed out ante at pages 10-12, that such is not the case, for the district judge below considered *all* relevant factors and standards, including those stated in the Gilbert case.

In the Ford case the basic question before the Court was whether the trial judge had abused his discretionary power under 1404(a) in refusing to transfer the action. Separate opinions were written by each of the three Circuit Judges[16] hearing the case and deciding whether mandamus proceedings should issue. Both Judges Hand and Frank declared that the decisions of district judges under 1404(a) should be accepted unless his guess was "too wild" or "clearly erroneous"[17] and they refused to order the vacating of the decision below. Judge Frank also stated that consideration should be given to the standards of the Gulf case in deciding motions to transfer under 1404(a).

The Court of Appeals in the instant case, by denying leave to file the mandamus proceedings, will be presumed to have held that the decision of the district court was not arbitrary and should not be vacated and that the District Judge did not abuse his discretionary power under 1404(a).

Both the Fifth and Second Circuits upheld the exercise of the District Judge's discretion under 1404(a) and no conflict of Federal law is found in the decisions.

The only prior pronouncement made by the Fifth Circuit in connection with Section 1404(a) is found in *Amalgamated Assn. etc. v. Southern Bus Lines* (1949) 172 F. (2d) 946, a forum non conveniens case. Judge Sibley observed in that case at p. 948 since transfer (under 1404(a)) is a less drastic matter than dismissal (under doctrine of forum non

[16] Judges L. Hand, Frank and Swan.
[17] At p. 332, 182 F. (2d).

conveniens) no doubt a broader discretion may be exercised in ordering it. The other circuits which have considered this question have agreed with this opinion (Appendix B) and respondent has found no Court of Appeals decision to the contrary.

The District Court cases cited by petitioners in their appendices are not material upon this petition, for, the supervision of their uniformity lies in the Courts of Appeal.

In addition to the immateriality, upon this petition, of the district court decisions cited in Petitoners' Appendices B, C and D, there is no conflict between what petitioners contend is their holdings, and any decision of the Fifth Circuit or any other Court of Appeals.[18]

Point III.

There is no Conflict with any Decisions of the Fifth Circuit and the Court of Appeals did not abuse its Discretion in refusing to Grant a Writ of Mandamus

Petitioners concede that the writ of mandamus which they sought under Section 1651(a), 28 U. S. Code, wherein they sought in the Court of Appeals below to obtain review of the interlocutory transfer order, is an extraordinary writ reserved for extraordinary cases. (Petitioners' Brief p. 15) As Justice Jackson stated in *Ex Parte Fahey* (1943) 332 U. S. 258, 260, 91 L. Ed. 2043:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But

[18] The purported decisions of some of the district courts that under 1404(a) "a heavy balance of convenience is necessary before a transfer can be made" or "district courts must accord consideration under Section 1404(a) to the criteria of the Gulf Oil case" is in no way inconsistent with the doctrine announced by the Fifth Circuit in the Southern Bus Co. case, ante p. 13, that transfers under 1404(a) can be more freely granted than dismissals under forum non conveniens. These are entirely different and separate considerations under 1404(a). The decision of the district judge below in no way conflicts with the purported holdings of the district courts since he considered all pertinent factors including those set forth in the Gulf Oil case, ante p. 10-12.

> they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him....."

It is hornbook law that the Court of Appeals has a broad discretion in determining whether the writ of mandamus should issue. *Roche v. Evaporated Milk Assn.* (1943) 319 U. S. 21, 87 L. Ed. 1185.

Petitioners contend that the Court of Appeals abused its broad discretion, to either sanction or withhold mandamus proceedings under Section 1651(a), by denying petitioners motion for leave to file a petition for mandamus. They urge that such decision was made without any consideration of the merits whatever and was thus contrary to the previous decision of the circuit in *Atlantic Coast Line v. Davis* (C.A. 5, 1949) 185 F. (2d) 766 (Pet. Brief p. 14-15).

This contention finds no support in the record. On April 24, 1951, petitioner filed a motion, in Court of Appeals below, for leave to file a petition for mandamus or other relief to be directed to Judge Barker to vacate and set aside the transfer order, *attaching as exhibits to said motion and petition, copies of all appropriate proceedings below* (R. p. a., j.). After oral argument and consideration of the motion for leave to file, and the petition, the Court denied the motion. The Court below had the merits of the case before it when its decision was rendered.

The Court of Appeals had power, upon such application, to consider the merits of the petition under Section 1651(a) without issuance of the writ[19] and in fact this Court did consider the merits of a District Court transfer order under 1404(a) in that manner in *Kilpatrick v. Texas & Pacific Railway Co.* 337 U. S. 75, 93 L. Ed. 1223 (1949).

The fact that in the *Atlantic Coast Line R. v. Davis* case the Court below ordered issuance of the writ of mandamus

[19] Ex Parte Peru 318 U.S. 578, 87 L. Ed. 1014 (1943).
Ex Parte Kuwato 317 U.S. 69, 87 L. Ed. 50 (1942).

prior to deciding the merits creates no conflict of decision between the two cases, since the Court could utilize either method.

Petitioners did not state the substance of the Davis case decision in their brief. A scant analysis of the two decisions will demonstrate that they have little in common.

In the Davis case the two primary questions before the Court of Appeals were (1) did the District Judge have power to retransfer the case to New York? (2) would the fact of two mis-trials in the Florida District Court justify a retransfer? First the alternative writ, then the peremptory writ of mandamus were issued. If the order of the Florida District Court retransferring the case to New York had remained undisturbed the Court of Appeals for the Fifth Circuit would have had no chance to review the order of retransfer after the entry of final judgment.

In the present case at bar ten of the eleven paragraphs (R. b-j.) of the petition for mandamus represented an attack upon the District Judge's findings of fact in connection with "convenience of parties and witnesses" under 1404(a). Petitioners' major complaint is that they disagree with the conclusions of fact reached by the trier of the facts under 1404(a), the District Judge, which conclusions the Court of Appeals refused to vacate upon mandamus proceedings.

The same Court of Appeals (for the Fifth Circuit) has appellate jurisdiction in the instant case after final judgment to review the order of transfer as an incident to its review of the final judgment rendered in the Tallahassee Division.

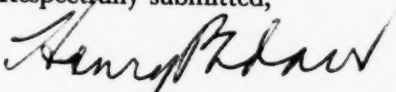
The Court of Appeals in the case at bar properly exercised its statutory discretion in refusing to sanction mandamus proceedings, and such decision in no way conflicts with its prior decision in the Davis case.

CONCLUSION

The petition for the issuance of a writ of certiorari should be in all respects denied.

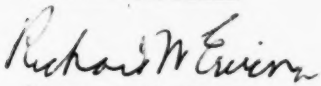
November 27, 1951.

Respectfully submitted,

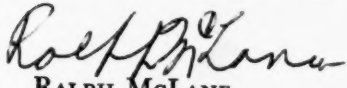


HENRY P. ADAIR

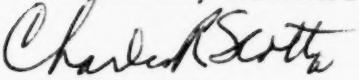
DONALD RUSSELL



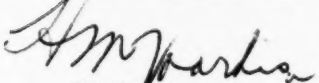
RICHARD W. ERVIN
Attorney General of Florida



RALPH MCLANE
Asst. Attorney General of Florida



CHARLES R. SCOTT



H. M. VOORHIS

Attorneys for Respondent

APPENDIX "A"

1. Title 28 U. S. C., Sec. 1404(a):

   Change of Venue

   "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. Title 28 U. S. C., Sec. 1392(a):
   Defendants or property in different district in same State

   "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

3. Title 28 U.S.C., Sec. 1406:
   "1406. Cure or Waiver of Defects.
   . . . (b) Nothing in this Chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue. June 25, 1948, C. 646 S. 1, 62 Stat. 937; May 24, 1949 C. 139 S. 81, 63 State. 101."

4. Title 15 U. S. C., Sec. 15:
   Suits by persons injured; amount of recovery.
   "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, Sec. 4, 38 Stat. 731)."

5. Title 15 U. S. C., Sec. 22:
   District in which to sue corporation.
   "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but

also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (Oct. 15, 1914, ch. 323, Sec. 12, 38 Stat. 736.)"

APPENDIX "B"

Courts of Appeal Decisions holding that Transfer may be more broadly Granted than could Dismissals under the Doctrine of Forum Non Conveniens

Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp. (C.A. 4, 1949) 177 F. (2d) 360, 362.

Headrick v. Atchison T. & S.F. Ry. (C.A. 10, 1950) 182 F. (2d) 305, 310.

Amalgamated Assn. etc. v. Southern Bus Lines (C.A. 5, 1949) 172 F. (2d) 946, 948.

No Court of Appeals decision has been found by respondent which holds that transfers under 1404(a) will be granted only under the same narrow circumstances as dismissal is granted under the doctrine of forum non conveniens.

Judge Kaufman (S.D.N.Y.) in his recent article "Transfer Under New Judicial Code" in 10 F.R.D. 595 at page 598 observes that though courts have variously characterized Section 1404(a) there is really little disagreement among them that transfer under 1404(a) is less harsh than dismissal under forum non conveniens and hence they (the Courts) are more prone to grant a transfer upon a showing of inconvenience.